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IN THE

Supreme Court of the United States

October Term, 1969

No. 1139 [redacted]

HAROLD KONIGSBERG,

Petitioner,

against

THE PEOPLE OF THE STATE OF NEW YORK,

Respondent.

On a Petition for a Writ of Certiorari to the United States Court of Appeals for the Second Circuit

RESPONDENT'S BRIEF IN OPPOSITION TO THE PETITION FOR A WRIT OF CERTIORARI

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Preliminary Statement

The petitioner seeks a writ of certiorari from this Court to review the order of the United States Court of Appeals for the Second Circuit, entered in this case on November 4, 1969 (see petitioner's brief, Appendix J, p. 38a). The jurisdiction of this Court is sought to be invoked pursuant to 28 U.S.C. Section 1254(1).

Statement of the Issue

Whether the Court below properly remanded petitioner's criminal proceeding to the New York City Criminal Court on a finding that petitioner's claim of denial of a speedy trial did not come within the purview of Title 28 U.S.C. Section 1443(1) permitting removal of an action from a state court to a federal court.

Statement of the Case

The State Criminal Proceedings

On December 10, 1963 a New York County Grand Jury filed Indictment No. 4725/63 charging petitioner and three others with one count of conspiracy as a felony, six counts of extortion, two counts of assault in the second degree and one count of attempt to commit the crime of extortion.

Between January 26, 1965 and April 27, 1965 a hearing was held in Supreme Court, New York County, by the Honorable ABRAHAM GELLINOFF, Justice of the Supreme Court, on petitioner's motion to determine his mental competency to stand trial. On April 27, 1965, Justice GELLINOFF confirmed the Bellevue Hospital report and found the petitioner competent to stand trial.

In May of 1965, the federal prison authorities requested permission of the New York County District Attorney's Office to transfer petitioner from the West Street House of Detention in New York County to a federal prison that was equipped with medical facilities.

On October 4, 1966, at the expense of the State of New York, the petitioner was ordered transferred from the Medical Center for Federal Prisoners at Springfield, Missouri to New York City to stand trial on the aforementioned indictment.

Between November 17 and December 2, a second sanity hearing was held concluding in an order that petitioner was competent to stand trial on Indictment No. 4725/63. The trial of this indictment took place over an eight-week period from December 7, 1966 to February 9, 1967 and resulted in a jury verdict finding petitioner guilty on four counts of extortion and one count of conspiracy to commit extortion. Petitioner was found not guilty on one count of extortion and no verdict was reached on two counts of assault in the second degree, one count of extortion and one count of attempted extortion.

On March 13, 1967, a trial was had to determine whether the petitioner was a prior felony offender which trial resulted in a verdict, on March 15, 1967, that petitioner had been convicted of two prior felonies. Thereafter, on April 10, petitioner was by judgment of the court sentenced to 30 to 44 years in State Prison.

Following judgment, petitioner Konigsberg was returned to the Federal Prison at the U.S. Medical Center in Springfield, Missouri, to complete serving a ten-year federal sentence for violation of Title 18 U.S.C. Section 659 (possession of stolen goods in interstate commerce). Petitioner is to commence serving his state sentence after completion of his federal sentence.

On April 11, 1967, petitioner served notice of his intention to appeal his conviction in New York County. On September 1, Frank Lopez, Esq., counsel of record for petitioner, made application for extension of time to perfect said appeal until the January, 1968 Term of the Appellate Division, First Department, of the New York Supreme Court. A second application for extension of time was made on December 8, and was granted until the April, 1968 Term. Petitioner then made a pro se application for a further extension of time until May, 1969 which was also granted. To date petitioner has, through these numerous motions, managed to delay the hearing of his appeal by the New York State Supreme Court, Appellate Division, First Department, until May, 1969. As a result of the lengthy record on appeal consisting of approximately 4,000 pages of sentencing proceeding and 2,500 pages of competency hearings, as well as the number of arguments raised on appeal (23 in number), the People were obliged to request an adjournment of the appeal which was granted. The People have submitted their brief and the appeal is now pending in the Appellate Division.

On April 7, 1967 in New York County, a twelve-count information was filed in the Criminal Court of the City of New York charging petitioner with various acts of contempt arising out of his conduct during the course of his trial from December 7, 1966 to February 9, 1967.

No date has been set for the trial of the counts of Indictment No. 4725/63 on which no verdict was reached.

The Prior Removal Proceeding and Concurrent State Proceedings

On August 9, 1968, the petitioner petitioned the United States District Court for the Southern District of New York for a removal of the contempt prosecution pending against the petitioner in the Criminal Court of the City of New York, County of New York, under Docket No. B-3615/67, as well as the remaining four counts of Indictment No. 4725/63, to the United States District Court (68 Civ. 3414).

On September 16, an order was entered in Part XXX, Supreme Court of the State of New York, New York County, by Justice MITCHELL D. SCHWEITZER, denying petitioner's motion for a speedy trial of the four counts of Indictment No. 4725/63 on which no verdict was reached, and finding that the People had established good cause for delay in trying petitioner on these counts (see Petitioner's Appendix F, p. 23a).

On September 18, petitioner, by his attorney Frank A. Lopez, Esq., filed a motion for a speedy trial or dismissal of the contempt information (Docket No. B-3615/67) in the Criminal Court of the City of New York. On October 18, 1968, Judge DANIEL WEISS denied the motion and ordered that the case be marked off the calendar.

On October 11, an order was entered in the United States District Court for the Southern District of New York, by District Judge SYLVESTER J. RYAN denying the petition for removal and remanding the proceedings to the state courts (see Petitioner's Appendix E, p. 21a).

In November of 1968, petitioner, by his attorney Frank A. Lopez, Esq., pursuant to the provisions of Article 78 of the New York Civil Practice Law and Rules, petitioned Special Term, Part I, of the Supreme Court of the State of New York, seeking a judgment directing the Judges of the Criminal Court of the City of New York to restore the contempt information (Docket No. B-3615/67) to the calendar. On January 3, 1969, the Honorable CHARLES MARKS denied the application and dismissed the petition (see Petitioner's Appendix H, p. 28a).

In November of 1968, the petitioner, by his attorney Frank A. Lopez, Esq., petitioned the Appellate Division of the New York Supreme Court, First Department, pursuant to the provisions of Article 78 of the New York Civil Practice Law and Rules, directing that Indictment No. 4725/63, now pending in the Supreme Court, New York County, be restored to the trial calendar, be moved for trial within a specific and definite time and, in the alternative, for failure to do so without good cause, for the dismissal of the indictment. On January 16, 1969, the court, by the Honorable HAROLD A. STEVENS, Presiding Justice, dismissed the petition.

The Present Removal Proceeding and Concurrent State Proceedings

On May 14, 1969, a petition for removal of the contempt information pending before the Criminal Court of the City of New York (docket no. B-3615/67) was filed in the United States District Court for the Southern District pursuant to Title 28 U.S.C. Section 1443(1).

On May 27, 1969, a motion for remand was filed by the office of the District Attorney, New York County, pursuant to Title 28 U.S.C. Section 1447(c) and on June 30, 1969, the proceedings were ordered remanded by District Judge CHARLES TENNEY, who found that the prosecution pending against petitioner did not fall within Title 28 U.S.C. Section 1443(1) and that therefore his petition for removal did not lie (see Petitioner's Appendix B, p. 2a).

On July 22, 1969, petitioner, by his attorney Frank A. Lopez, Esq., filed a notice of appeal from the order of District Judge TENNEY. In August of 1969, the petitioner, by his attorney Frank A. Lopez, Esq., filed a motion in the Criminal Court of the City of New York seeking a dismissal of the pending contempt information (Docket No. B-3615/67), together with such other relief as the court would deem just and proper. On September 22, Judge WILLIAM RINGEL ordered the contempt information restored to the calendar for trial. The case is now on the calendar for April 7, 1970 in Part 2B1 of the Criminal Court of the City of New York.

On November 4, 1969, the United States Court of Appeals for the Second Circuit unanimously affirmed the order of remand (see Petitioner's Appendix J, p. 38a).

ARGUMENT

Since the petitioner's contention that he has been denied a speedy trial is not a ground for removal to the federal court under 28 U.S.C. Section 1443(1), the criminal prosecution pending against him was properly remanded to the state court.

The petitioner contends that he is being denied his constitutional right to a speedy trial by the state court, and he seeks to have the pending New York Criminal Court information removed to the federal court pursuant to Title 28 U.S.C. Section 1443(1).

The question actually being raised, however, is not whether the petitioner is entitled to a speedy trial, but whether removal of the action to the federal court is the appropriate means for testing his contention that he is being denied a speedy trial.

Congress, in the enactment of 28 U.S.C. §1443(1), set forth specific requirements that must be complied with before removal of an action is warranted. Likewise, this Court has recently reaffirmed, in an opinion concerning a removal proceeding, that the state has a compelling interest in conducting criminal trials in its own courts. *Willingham* v. *Morgan*, 395 U.S. 402, 409 n. 4 (1969).

It is clear both from the applicable statute and this Court's interpretation that the case now pending against the defendant Konigsberg in the Criminal Court, New York County, may not be removed to the federal court. Title 28 U.S.C. Section 1443(1) provides that:

> "Any of the following civil actions or criminal prosecutions, commenced in a State Court may be removed by the defendant to the district court of the United States for the district and division embracing the place wherein it is pending:
>
> "(1) Against any person who is denied or cannot enforce in the courts of such State a right under any law providing for the equal civil rights of citizens of the United States, or of all persons within the jurisdiction thereof * * *."

This statute contemplates removal of state prosecutions to the federal court against persons who cannot enforce a right in the state courts under "any law providing for specific civil rights stated in terms of racial equality." *Georgia* v. *Rachel*, 384 U.S. 780, 792 (1966); see, *Chestnut* v. *People of the State of New York*, 370 F. 2d 1 (2d Cir. 1966), *cert. denied*, 386 U.S. 1009 (1966). Only when the right upon which the defendant relies is a "right under any law providing for equal civil rights," and the defendant is "denied or cannot enforce" that right in the state courts, do the provisions of Section 1443 apply.

Where, as in the present case, the right is of general application to all persons or citizens, petitioner is not entitled to have a state criminal prosecution removed under the statute providing for removal in civil rights cases. *United States ex rel. Perkins* v. *Noble*, 287 F. Supp. 365 (1968); see *Georgia* v. *Rachel, ante.*

Moreover, petitioner's application is insufficient in a further respect. The allegation of the petitioner is that the judiciary of the State of New York is acting in an unjust manner, thereby depriving him of his constitutional

right to a speedy trial. His allegation is not, as required by Title 28 U.S.C. Section 1443(1), that his rights will be denied because of the operation of an explicit state law. This Court, in *Greenwood* v. *Peacock*, 384 U.S. 808, 827-8 (1966), has designated the touchstone to be applied in deciding removal cases under this statute. This Court stated:

> "* * * It is not enough to support removal under Section 1443(1) to allege or show that the defendant's federal equal civil rights have been illegally and corruptly denied by state administrative officials in advance of trial, that the charges against defendant are false, or that the defendant is unable to obtain a fair trial in a particular state court. * * * The civil rights removal statute does not require and does not permit the judges of the federal courts to put their brethren of the state judiciary on trial. Under Section 1443(1) the vindication of the defendant's federal rights is left to the state courts except in rare situations where it can be clearly predicted by reason of the operation of a persuasive and explicit state or federal law that those rights will inevitably be denied by the very act of bringing the defendant to trial in the state court. *Georgia* v. *Rachel, ante; Stauder* v. *West Virginia*, 100 U.S. 303."

The "provisions of Section 1443(1) do not operate to work a wholesale dislocation of the historic relationship between the state and federal courts in the administration of the criminal law." *Id.* at 831. It is not enough for the petitioner to claim the right of removal afforded by Title 28 U.S.C. Section 1443(1)—he must come within the purview of those for whom this right is intended. This he has failed to do. Since petitioner has not shown that his

asserted federal constitutional rights have been denied him by the operation of state law [see *Greenwood* v. *Peacock*, 384 U.S. 808, 827-8 (1966)], removal does not lie and his petition for a writ of certiorari should be denied.

Conclusion

The petitioner's petition for a writ of certiorari should be denied.

Respectfully submitted,

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